support of the holding of the Court of Appeals for the Second Circuit. They do not dispose of the grounds upon which the Writ is here sought, namely the sharp conflict between the Courts of Appeals for the Second Circuit and Seventh Circuit in the interpretation of important federal legislation to the maritime industry.

In Respondent's Point II (Respondent's Brief, pages 8-11), it is argued that after the passage of COGSA, the "decided weight of authority" holds "an unreasonable deviation not only deprives carriers of all exemptions and limitations in bills of lading, but also those provided by statute" (page 8).

As to "exemptions and limitation in bills of lading", COGSA represents a *statutory* compromise between cargo and carrier interests. The Act changes the law from what it was prior to the Act and provides a complete set of statutory rights and liabilities non-existent under the Harter Act, 46 U.S.C. 190 *et seq.*, or any other prior legislation. Accordingly, cases holding that deviation deprives a carrier of *contractual* exemptions or limitations do not apply to cases arising under the Act. Under the Carriage of Goods By Sea Act the question is not whether the carrier can take the benefit of *contractual* exceptions in the bill of lading. The question is statutory, and accordingly, the issue is not whether the court will enforce the terms of the bill of lading contract but what the express *statutory* provision of the Carriage of Goods By Sea Act is.

The "decided weight of authority" has *not* deprived carrier's of "exceptions and limitations . . . provided by statute", but on the contrary, has given effect to the unequivocal language "in any event" in applying the COGSA time limitation to sue and the limitation of liability, a deviation notwithstanding.

In *Nassau Glass Company* v. *Noel Roberts Ltd. and M/V Noel Roberts,* (S.D. Fla. 1965), 249 F.Supp. 116 the

court considered a deviation, involving on-deck stowage without notation on the bill of lading, as it affected the liability limitation, and stated at page 117:

> "The statute appears plain that liability is limited to $500 in all cases in which the bill of lading is silent as to the value of the cargo and this applies *'in any event'* and to *'any loss or damage'*." (Emphasis added.)

In *Potter* v. *North German Lloyd* (D.C. Cal., 1954), 50 F. Supp. 173 the court considered the effect of a deviation, consisting of the abandonment of a voyage, on the Carriage of Goods By Sea Act time limitation (Section 3[6]). The court stated at page 173:

> "If however the one-year time limit for bringing suit provided in the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1303(6), applies to this case, the decision of it will be necessarily controlled by such statutory time limit with the result that plaintiff's action will be defeated whether the question as to deviation and its related questions are decided in plaintiff's favor or not.
>
> There can be no question but that the courts of this country, as required by 46 U.S.C.A. § 1300, have been applying to carriage contracts for ocean shipments in foreign trade to and from American ports the Carriage of Goods By Sea Act, supra, and Section 1303(6) thereof which in material part provides that: *'In any event* the carrier and the ship shall be discharged from all liabilitiy in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *'."
>
> * * *
>
> "There seems no escape from defendant's seventh affirmative defense contained in its answer filed July 29, 1941, that plaintiff's suit was not brought within the one-year time provided in the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1303(6), and that plaintiff's action is barred by that statutory time limitation." (Emphasis added.)

In *Singer Hosiery Mills* v. *Cunard White Star* (1951), 199 Misc. 389, 102 N.Y.S. 2d 762, the court considered the effect of a deviation, involving the over-carriage of goods, on the COGSA time limitation, and stated at 102 N.Y.S. 2d 765:

> ". . . the question of shipments by sea to or from ports of the United States is a matter of Federal regulation, more especially so when the shipment is governed by a bill of lading. The Carriage of Goods By Sea Act (U.S. Code, tit. 46, § 1300 et seq.) regulates the rights and obligations of the carrier and the shipper in the instances and in the particulars provided for in the Act. Sec. 1303(6) provides:
>
> * * *
>
> 'This provision of the Act is all inclusive; it is of the substance of the rights between the parties. Granting that a breach has occurred and even assuming that the provisions of the bill of lading have been nullified and the carrier has become an insurer, under our Federal law which governs this action, the shipper, unless he has in some manner been relieved from the one-year limitation, is bound to begin the action for a breach within one year after delivery of the goods or when the goods should have been delivered.'"

It is stated in *United States* v. *Wessel, Duval & Co.* (SDNY, 1953), 115 F. Supp. 678, at page 684:

> "Those words '*in any event*' may well result in preserving this statutory limitation even though the ship has been guilty of a deviation." (Emphasis added.)

In *Poor on Charter Parties and Ocean Bills of Lading* (5th Ed., 1968), it is stated in Section 64 (p. 165):

> "It has sometimes been questioned whether this time limitation is applicable in cases of deviation. The decisions hold that it is, and this is sustainable on two grounds: (1) a statute is not displaced by a deviation, (2) the paragraph commences with the

> words *'in any event'*, indicating that the statutory bar applies no matter what has happened.'' (Emphasis added.)

The ''decided weight of authority'' to which respondent refers consists of *Searoad Shipping Co.* v. *E. I. DuPont de Nemours & Co.*, 361 F.2d 833 (5th Cir., 1966), cert. den. 385 U.S. 973, and *Francosteel Corp.* v. *N. B. Nederlandsch*, 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. den. 389 U.S. 931 (1967).

Francosteel Corp. v. *N. V. Nederlandsch Amerikaansche, S. M.* does not involve a conflicting decision of another Circuit. In that case, the Court states as its ''Conclusion'', that no precedent had been found on the issues then before the Court. The Court stated ''No determinative precedents on the scope of the one-year limitation have been found in either the cases construing Section 3(6) or those dealing with other provisions of the Hague Rules''. In referring to the Seventh Circuit Case in conflict with the decision below in the present matter, the Court states, as dicta (quoted by Respondent at page 10 of its Brief):

> ''From the foregoing cases it appears that defendant's reliance on Poseidon resembles a sand castle in danger of engulfment from a rising tide of contrary opinion.''

The *Poseidon* Case was decided in 1963, and the ''foregoing cases'' consist principally of decisions preceding the *Poseidon* Case, including some preceding COGSA. The ''rising tide of contrary opinion'' consists of a Temple L.Q. note (36 Temple L.Q. 222), and a 1954 U. of Pa. L. Rw. note (102 U. of Pa. L. Rw. 797).

Plaintiff places particular reliance on *Searoad Shipping Company* v. *E. I. duPont de Nemours and Company, supra.* In that case, the consideration of the Court was directed, not to the effect of the statutory limitation of liability, but to defenses asserted by the carrier as a basis for avoiding

liability. The limitation of liability provisions of COGSA were no issue; the cargo "consisted of 800 cases High Explosives—Dynamite and 50 cases Cordeau Detonant Fuse (primacord)" (361 F.2d 834, n. 2). On the basis of the COGSA $500 per package limitation, the loss would have to exceed $425,000 before the applicability of the statutory package limitation became a factor. The decision is directed to two contentions, asserted by the carrier, on the issue of whether there was, in fact, a deviation (361 F.2d 833, 834). The Court found against the shipowner on both issues, and concluded:

> ". . . we have no doubt that the insurer liability continues after COGSA (9) to flow from on deck deviation when the damage is causally related", (Pages 835, 836).

The Court does not proceed to the next step, which is the issue in the present matter, as to the effect of the COGSA statutory limit on such liability—it was unnecessary, since no question of statutory limitation was involved. This would explain why the Court saw no need to mention the earlier decision in the same Southern District of Florida, of *Nassau Glass Co.* v. *Noel Roberts Ltd. and M/V Noel Roberts* (*supra*), holding liability was limited under COGSA, even assuming an unreasonable deviation from on-deck stowage.

The *Searoad Shipping* Case is authority for the proposition that a deviation makes the carrier an insurer, and nothing more. The Court then had no need to consider the effect of the COGSA limitations under such circumstances. The same does not hold true in the *Poseidon* Case, where, in the opinion of the District Court affirmed by the Court of Appeals, it is stated at 206 F. Supp. 19:

> "Although a 'deviation' strips a ship of all excuses in her charter party and imposes upon her at least the liability of a common carrier, which is the liability of an insurer, Farr v. Hain S.S. Company,

> 2 Cir., 121 F.2d 940 (1941), the clear words of 46 U.S.C.A. § 1304(5), will serve to limit this liability to $500 per package where value has not been declared".

It is submitted here, as in the *Poseidon* Case, there is the further issue of determining whether, assuming the carrier *has* become an "insurer", the statutory limitations of COGSA apply. It is further submitted, on the authority of the cases cited above, the statutory COGSA limitation applies notwithstanding a deviation.

Further, the Court, in the *Searoad Shipping Case,* did not consider the application of the COGSA *statutory* provisions on the limitation of liability, but rather, the *contractual* incorporation of COGSA in the bill of lading. The Court notes, at page 835, n. 4, "The bills of lading contained the COGSA Clause Paramount, 46 U.S.C.A." Footnote 9, in the Court's conclusion quoted above, cites *Knauth, Ocean Bills of Lading,* 260 (1953):

> "It has become well settled that stowage of cargo on deck . . . is such a fundamental breach of the contract of carriage as to *displace the contract clauses* which might benefit the carrier . . ." (Emphasis added.)

It is Petitioners' position that the COGSA statutory provisions apply, without reference to contractual exceptions, and for this further reason, the *Searoad Shipping Case* has no bearing on the present matter.

In Respondent's Point III, the contention is reiterated that "COGSA made no change in the law of ocean carriage as to the effect of an unreasonable deviation upon a carrier's liability" (Respondent's Brief, page 11), and Respondent asserts that "COGSA's only reference to deviation is in § 1304(4)". However, here again, this argument relates to an aspect wherein the conflict between the opinions of the circuits is sharply defined. The opinion of the

Seventh Circuit in the *Poseidon Case,* finds support for its conclusion in the very "reference" noted by Respondent, stating at 313 F.2d 874-875:

> "In addition to the reasons stated by the district court, our conclusion finds support in the fact that the package limitation immediately follows § 4(4) of the Act, 46 U.S.C.A. § 1304(4) in which Congress, as we have already stated, recognized the carrier's liability for unreasonable deviations. It is difficult for us to believe that Congress did not intend this limitation to apply to the section next preceding it. (313 F.2d at pp. 874-875)."

In like manner, Respondent's Point IV (Respondent's Brief, page 15) is directed to the contention that "the legislative history, as well as the text of COGSA, establish that the intention of the legislators was to increase the carrier's liability and particularly that they intended that the $500 limitation did not apply in a case of deviation not excusable under COGSA § 4". Respondent's contention again only serves to emphasize the sharp conflict on the question. In the District Court decision affirmed by the Circuit Court, in *Atlantic Mutual* v. *Poseidon, supra,* it was stated, as to "legislative intent", at 206 F. Supp. 19:

> "It appears from a reading of the statute in its entirety, and from the records of hearings before the Senate Committee on Commerce on Senate Bill 1152, 74th Congress, First Session (1935), Page 47, that the doctrine of 'unjustifiable deviation' was not only reaffirmed, but expanded to apply to all breaches of obligation upon notice. For the purpose of applying this statute, I am unable to categorize liabilities into two classes, in the face of the express and clear language of the statute: those resulting from 'unjustifiable deviations' and those resulting from other breaches of obligation. Admiralty in its inherent differences of setting from the rest of our body of law has never intended to confine to itself the authority to resist clear statutory direction, good law, good reasoning and clear legislative intent, by virtue of

traditions which justifiably preserve it as a 'different' body of law.

In balancing the rights and liabilities of carriers and shippers, Congress clearly expanded the law to impose upon carriers full damage liability; but to impose upon shippers the responsibility of due notice. Under the Act, the carrier, if it has been given notice of the nature and value of the goods, may not assert any limitations of liability, contractual or statutory but it may adjust its shipping rates and its exercise of special care to reflect its own increased risk. On the other hand, if there is no notice, its liability will extend on the actual value of the goods carried, up to $500 a package, any lesser contractual limitation to the contrary notwithstanding.

Although a 'deviation' strips a ship of all excuses in her charter party and imposes upon her at least the liability of a common carrier, which is the liability of an insurer, Farr v. Hain S.S. Company, 2 Cir., 121 F.2d 940 (1941), the clear words of 46 U.S.C.A. § 1304(5), will serve to limit this liability to $500 per package where the value has not been declared. In the case at bar, the acceptance of the goods from the Libellant after the contemplated date of delivery by the shipper did not constitute a waiver of the breach of contract, though it did serve to reduce the measure of the consignee's damages."

In its Point V, Respondent sees a certain consistency in those opinions contrary to its contentions. As to the Court of Appeals for the Seventh Circuit, "There is no suggestion in the Appellate Court's opinion of independent legal research of the issue of law presented" (page 17), and as to the dissenting opinion in the Court below, "The dearth of authority and absence of analysis in the dissenting opinion also suggests an en passant consideration of the issues. . . ." (page 19). However, the opinion of the majority judges in the Court below, on the question here under consideration as to the effect of a deviation on the COGSA statutory limitation of liability, reads as follows:

> "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation. It is not disputed that the damage of the cargo was caused by sea water to which it was exposed by being stowed on deck. The carrier is liable for the full amount of damages sustained without benefit of the $500 limitation per package of COGSA. *Jones* v. *The Flying Clipper,* 116 F.Supp. 386 (S.D.N.Y. 1953)." (Page 33a.)

In its Point VI, Respondent contends "sound public policy would seem to require that liability for the hazards of on-deck stowage continued to be imposed on wilfully deviating shipowners rather than on innocent cargo owners," and that "the opposite result should not be reached without a clear and compelling indication that such was the intent of Congress", (page 21).

Without attempting to explore the statutory protections and conditions available to "innocent cargo owners", the fact of the matter remains that, as heretofore noted, the circuits are in conflict as to what is "the intent of Congress", and it is precisely for that reason that a Writ is warranted. The denial by this Court of Petitions for Writs of Certiorari in the cases referred to by respondent (Respondent's Brief, page 23), should not be controlling. As heretofore noted, the *Searoad Shipping Case* is not in point, and the *Francosteel Corp.* and *Atlantic Mutual Cases* involved no conflict between circuits. Here, as appears in the Petition for a Writ of Certiorari, there is a sharply defined conflict of authority between the Court of Appeals for the Second Circuit and the Court of Appeals for the Seventh Circuit.

Petitioners' Second Reason for Granting the Writ

Petitioner asserts the holding of the Court below, that the bill of lading provisions permitting on-deck stowage violates the Carriage of Goods by Sea Act, § 46 USC 1303(8), is based on propositions in direct conflict with the decisions of other Courts of Appeals.

Respondent's argument as to this (Respondent's Brief, Point I), again consists of contentions in support of the conclusion reached by the Court below. It does not achieve any conciliation of the decisions of other Circuits, which are noted in the Petition for a Writ of Certiorari submitted herein, and which are in conflict with the reasoning of the Court below.

CONCLUSION

Respondent's Brief in opposition does not, and cannot, explain or resolve the sharp conflict between the Circuits on the important issues here involving federal legislation. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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